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No. 76-1547

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

SAMUEL H. SLOAN AND SAMUEL H. SLOAN  
D/B/A SAMUEL H. SLOAN & CO., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT*

BRIEF FOR THE SECURITIES AND EXCHANGE  
COMMISSION IN OPPOSITION

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 38a-49a), as modified (Pet. App. 50a-51a), is reported at 547 F. 2d 152. The opinion of the Securities and Exchange Commission (Pet. App. 23a-35a) is reported in Securities Exchange Act Release No. 11376 (April 28, 1975), 6 SEC Docket 772.

**JURISDICTION**

The judgment of the court of appeals was entered on November 18, 1976, and a petition for rehearing was denied on January 24, 1977. On May 4, 1977, Mr. Justice Marshall extended the time in which to file a petition for

a writ of certiorari to and including May 15, 1977. The petition was filed on May 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTIONS PRESENTED

1. Whether petitioners were given adequate notice and opportunity for hearing prior to Sloan & Co.'s registration being revoked and petitioner Sloan being barred from association with other brokers or dealers.
2. Whether the Commission properly concluded that such revocation and bar were in the public interest.
3. Whether petitioner Sloan & Co. had an absolute right to withdraw its broker-dealer registration prior to revocation of the registration by the Commission.
4. Whether the Securities Exchange Act of 1934 authorizes the Commission to prohibit petitioner Sloan for more than twelve months from being associated with other brokers or dealers.
5. Whether the Commission's suspension of trading in the stock of Canadian Javelin, Ltd. was supported by substantial evidence.

#### STATUTES AND RULES INVOLVED

The statutes and rules involved in the instant case are set forth at Pet. 8-25.

#### STATEMENT

After an evidentiary hearing and full administrative proceedings, the Securities and Exchange Commission found (Pet. App. 23a-29a) that petitioner Samuel H. Sloan & Co., a registered broker-dealer, (1) had willfully violated various provisions of the Securities Exchange Act of 1934 (48 Stat. 881, as amended, 15 U.S.C. 78a *et seq.*) and the Commission's rules and regulations thereunder (17 C.F.R.

Part 240), and (2) had been enjoined from violating certain of those provisions. The Commission revoked the registration of Sloan & Co. and prohibited its sole proprietor, petitioner Samuel H. Sloan, from being associated with any broker or dealer (Pet. App. 36a-37a).

The Commission, affirming the administrative law judge, ruled that Sloan & Co. had committed the following violations:

1. It "willfully violated the recordkeeping provisions of Section 17(a) of the [Securities] Exchange Act and Rule 17a-3 thereunder" by committing "extensive and persistent recordkeeping" violations during the first eight months of 1971 (Pet. App. 24a-25a).
2. It willfully violated the net capital requirements in Section 15(c)(3) of the Act, 15 U.S.C. 78o(c)(3), and Rule 15c3-1 thereunder (Pet. App. 26a).<sup>1</sup>

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<sup>1</sup>The administrative law judge had found that net capital deficiencies ranging from \$718 to \$70,064 existed on eleven separate dates between January 18, 1971, and January 31, 1972 (Pet. App. 26a, 31a n. 11). Noting that Sloan did not challenge these findings in his appeal to the Commission, but merely challenged the finding that he had engaged in business between the end of July and September 1971 (Pet. App. 26a), the Commission stated (*ibid.*):

Sloan's own testimony shows that he engaged in the securities business \* \* \* from January to July 28, 1971. And in January of 1972 he inserted quotations for various securities in the \* \* \* [quotation listings] published by the National Quotation Bureau, Inc.

Thus, without reaching the question whether Sloan & Co. violated the net capital requirements between July 28, 1971 and January, 1972, the Commission found that it violated those requirements "in January, February, June and July, 1971, and January of 1972" (*ibid.*; footnote omitted).

3. It willfully violated Section 17(a) of the Act, 15 U.S.C. 78q(a), and Rules 17a-5 and 17a-10 by failing to file with the agency within the prescribed times a Rule 17a-5 report of financial condition for 1970 and a Rule 17a-10 report of income and expenses for the same year (Pet. App. 26a-27a), and willfully violated Rule 17a-11 by failing to give the Commission telegraphic notice of the firm's net capital deficiency on the day it occurred and by failing to file a report of financial condition with the Commission within 24 hours thereafter (*id.* at 32a n. 17).

In revoking Sloan & Co.'s registration and barring Sloan from being associated with any other broker or dealer, the Commission concluded that the violations it had found were "neither trivial nor technical. They involve flagrant and long-continued breaches of significant duties imposed on persons in the securities business" (Pet. App. 27a-28a). The Commission noted that prior to the initiation of its administrative proceedings, the United States District Court for the Southern District of New York, in a suit the Commission had brought, had enjoined Sloan & Co. from operating as a broker-dealer while in violation of the net capital rules, and from violating the recordkeeping requirements (*id.* at 3a, 10a-11a, 27a), that the preliminary injunction had "become permanent" and that the permanent injunction, "unlike the preliminary one, was entered after a trial" (*id.* at 27a). The Commission also gave "some weight to the fact" that Sloan had also been preliminarily enjoined in a second Commission enforcement action from additional violations of the Act and the Rules, and noted that "Sloan's own papers in the second injunctive suit show his continuing disposition to disregard or defy the rules governing registered broker-dealers" (*id.* at 28a) and that Sloan had stated, in an affidavit filed in the court of appeals, that he did "not intend to comply with the \* \* \* injunctive order" (*ibid.*).

The court of appeals affirmed the Commission's actions (Pet. App. 39a-41a). It also held, in a separate appeal by petitioners (Docket No. 76-4110), that a Commission order suspending trading in the common stock of Canadian Javelin, Ltd. for ten days was valid (Pet. App. 44a-45a).<sup>2</sup>

#### ARGUMENT

The 70-page petition challenges the Commission's order on numerous grounds involving constitutional, statutory and evidentiary claims. The court of appeals correctly rejected these claims, and they present no issue warranting further review. As the court correctly concluded, petitioners' constitutional attacks upon the statute are frivolous, and most of their points "have no merit and call for no comment" (Pet. App. 41a).

1. Petitioners contend (Pet. 34, 39-40) that they did not receive adequate notice that the Commission would rely upon the permanent injunction and the second preliminary injunction, or upon Sloan's affidavit in the court of appeals. The order instituting the administrative proceedings, however, alleged that Sloan had been preliminarily enjoined from operating as a broker-dealer at a time when Sloan & Co. was "not in compliance with Sections 15(c)(3) and 17(a) of the [Securities] Exchange Act and Rules 15c3-1, 17a-3 and 17a-4 thereunder" (Pet. App. 3a).

The statute, in Section 15(b)(5) and (7), permitted the Commission to revoke the registration of any broker-dealer or to bar any person from being associated with a

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<sup>2</sup>The court of appeals further held that under the statute the Commission cannot impose successive ten-day suspensions of trading in a stock. The Commission has filed a petition for a writ of certiorari (No. 76-1607) challenging that ruling. That issue is distinct from any of the issues petitioners raise.

broker or dealer who has been "permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as \* \* \* [a] broker, or dealer."<sup>3</sup>

Although in determining the remedy the Commission also took into consideration occurrences subsequent to the order initiating the proceedings (see Pet. 34-35), these consisted of the indisputable facts that the preliminary injunction referred to in that order had become permanent, that a further injunction had been entered and that a statement had been made by petitioner Sloan in an affidavit filed in the court of appeals in the latter case (see Pet. App. 27a-29a). Petitioners do not show how more explicit notice would have enabled them to refute these facts.<sup>4</sup>

2. Petitioners argue at length (Pet. 38-39, 41-63) that the Commission's findings that Sloan & Co. willfully violated the Act and the Rules, and that the public interest required that Sloan & Co.'s registration be revoked and that Sloan be barred from being associated with any broker or dealer, are not supported by substantial evidence. These purely factual issues do not warrant further review. Moreover, each of the injunctions entered by the district court itself was, as the court of appeals noted, "a sufficient ground to support the revocation of Sloan's broker-dealer license \* \* \*" (Pet. App. 41a).

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<sup>3</sup>Comparable provisions are now contained in Section 15(b)(4) and (6), 15 U.S.C. (Supp. V) 78o(b)(4) and (6).

<sup>4</sup>Although petitioners contend that they did not receive adequate notice of and opportunity for hearing on the violations charged, the court of appeals correctly held that the notice initiating the administrative proceedings detailed petitioners' violations "with great particularity and in detail" (Pet. App. 40a-41a). Petitioners also had a full evidentiary hearing (Pet. App. 10a).

3. Petitioners also contend (Pet. 34) "that under constitutional principles set forth in *Jones v. S.E.C.*, 298 U.S. 1 (1936) \* \* \* Sloan & Co. had an absolute right to withdraw its broker dealer registration" prior to a Commission decision to revoke that registration. *Jones* dealt, however, with the withdrawal of a registration statement under the Securities Act of 1933. As the court of appeals pointed out (Pet. App. 40a), "[i]t had nothing whatever to do with a broker-dealer licensing registration." Petitioner Sloan & Co. had no absolute right to withdraw its registration; the Commission's authority to revoke registration is an important element of the regulatory scheme, since "[t]here is quite a distinction in the position of one who could say, "I resigned" and one who says, "I was expelled."'" *Peoples Securities Co. v. Securities and Exchange Commission*, 289 F. 2d 268, 275 (C.A. 5); see also *Blaise D'Antoni & Associates, Inc. v. Securities and Exchange Commission*, 289 F. 2d 276 (C.A. 5), rehearing denied, 290 F. 2d 688, certiorari denied, 368 U.S. 899.

4. Petitioners assert (Pet. 33) that under the statute the Commission's prohibition against Sloan's association with any broker or dealer cannot exceed twelve months. They rely upon (Pet. 11) the language in Section 15(b)(7) of the Act, 15 U.S.C. 78o(b)(7), which authorizes the Commission to "bar or suspend for a period not exceeding twelve months any person from being associated with a broker or dealer." The words "for a period not exceeding twelve months" modify the word "suspend" and not, as petitioner contends, the word "bar." Under petitioners' interpretation, the word "suspend" would be surplusage. Other courts of appeals

have recognized that the Commission may bar such association for more than twelve months.<sup>5</sup>

5. With respect to the Commission's order suspending trading in Canadian Javelin stock for ten days, the court of appeals held (Pet. App. 44a) that "an examination of the record discloses there was sufficient evidence of probable manipulation of CJL's common stock and of the false and fraudulent representations as to its soundness and value to justify the Commission's conclusion that the public interest and the protection of investors required it summarily to suspend trading." There is no occasion for further review of that factual determination.

#### **CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

**WADE H. McCREE, JR.,**  
*Solicitor General.*

**DAVID FERBER,**  
*Solicitor,*

**FREDERICK B. WADE,**  
*Special Counsel,*  
*Securities and Exchange Commission.*

**JULY 1977.**

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<sup>5</sup>See, e.g., *Hanly v. Securities and Exchange Commission*, 415 F. 2d 589, 597-598 (C.A. 2); *Fink v. Securities and Exchange Commission*, 417 F. 2d 1058, 1059-1060 (C.A. 2); *Nees v. Securities and Exchange Commission*, 414 F. 2d 211 (C.A. 9); *O'Leary v. Securities and Exchange Commission*, 424 F. 2d 908 (C.A. D.C.).